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January 4, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

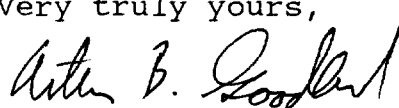
Hand Delivered

Dear Ms. Searcy:

Transmitted herewith, on behalf of Great American Broadcasting Company, McGraw-Hill Broadcasting, Inc. and The New York Times Company, are an original and eleven copies of their comments in MM Docket No. 92-259, the proceeding dealing with broadcast signal carriage issues arising under the Cable Television Consumer Protection and Competition Act of 1992.


In the event there are any questions, please communicate with this office.

Very truly yours,



Arthur B. Goodkind

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection) MM Docket No. 92-259
and Competition Act of 1992)
)
Broadcast Signal Carriage Issues)

COMMENTS OF BROADCAST RESPONDENTS

Great American Broadcasting Company, McGraw-Hill
Broadcasting Company, Inc. and The New York Times Company, by
their attorneys, hereby file their comments in response to the
Notice of Proposed Rulemaking released November 19, 1992 in the
above-captioned matter. Either directly or through wholly owned
subsidiaries, each of the companies filing these comments is the
licensee of four or more television stations. The companies are
referred to jointly in these comments as "Broadcast Respondents."

Broadcast Respondents' comments are limited to a single
issue, which is the updating of Section 76.51 of the Commission's
Rules required by the Cable Act of 1992. See paragraphs 21-23 of
the Commission's Notice. For the reasons set forth below,
Broadcast Respondents urge the Commission to revise Section 76.51
as follows:

- (A) Section 76.51 should include a listing of all
television markets, not just the top 100 markets. The

geographic boundaries of such markets should be as determined by Arbitron for Arbitron-defined Areas of Dominant Influence (ADIs), and the numerical rankings of markets should be according to the total number of television households in each ADI.

- (B) Although the geographic boundaries of each market should be those of Arbitron's ADIs, Section 76.51 should include in the market name for each market all communities within the ADI to which any commercial television station is assigned. The market names will thus in some cases include a greater number of community names than used by Arbitron in its market listings.
- (C) The list of markets in Section 76.51 should be revised every three years, with the specific market listings to be based on Arbitron's market list for the prior (not the current) year.

INCLUSION IN EACH MARKET NAME OF ALL COMMUNITIES TO WHICH
TELEVISION STATIONS ARE ASSIGNED WILL ELIMINATE PRESENT
INEQUITIES IN APPLICATION OF THE COMMISSION'S EXCLUSIVITY RULES

As the Commission states in paragraph 21 of the Notice, the list of the top 100 markets in Section 76.51 is now very much outdated. That fact would require revision of the list even if it were not for the requirements of the Cable Act of 1992. In making these revisions, the Commission should take this

opportunity to eliminate certain inequities created by the current rule.

As Section 76.51 is now written, the market names of the television markets listed in that section do not necessarily coincide with Arbitron's official names for each ADI, nor does the 76.51 list or Arbitron's ADI list include the names of some communities to which television stations are assigned in a number of markets. That is always the case for Arbitron names for markets in which some communities have stations that operate solely or partially as satellites. Moreover, as the Notice recognizes in describing the New York market, Arbitron's market names may in some cases fail to include even communities in which there are operating, non-satellite stations.

These circumstances produce anomalous and inequitable results under the FCC's Rules. That is because a station's rights to acquire and enforce program exclusivity are presently determined by the station's market name as listed in Section 76.51, if the station is located in one of the top 100 markets originally listed in that section, or by Arbitron's market names if the station is located in any other market. To illustrate, assume that "Jonesville-Smithville" is a hyphenated market in the top 100 and is listed as such in Section 76.51 of the Rules. Assume further that Jonesville and Smithville are 40 miles apart and that each has an operating television station assigned to it. On those facts:

(A) Under Section 73.658(m) of the Commission's Rules, the Jonesville station may contract with program suppliers for territorial exclusivity as against the station in Smithville, and the Smithville station may contract for similar territorial exclusivity as against the station in Jonesville.

(B) If the Jonesville station contracts with a program supplier for network or syndicated programming exclusivity on cable, it may enforce such exclusivity rights as against cable systems within a 35-mile radius of Jonesville and as against cable systems located in Smithville or within a 35-mile radius of Smithville.¹

The net effect of these provisions is that television stations are generally able to acquire program exclusivity as against other stations whose communities are included in their ADI names, and such stations are able to obtain network and syndicated programming exclusivity on cable systems within all or substantial portions of the stations' ADIs. The present FCC rules create an anomaly, however, when a community to which a station is assigned is not included in the name of its ADI. In the example above, for example, if the market name was listed simply as "Jonesville" rather than "Jonesville-Smithville":

¹ If Jonesville-Smithville was not included in the top 100 market listing in Section 76.51, each station would be entitled to enforce network exclusivity with respect to cable systems located within a 55-mile radius of each of the two communities.

- (A) Neither the Jonesville station nor the Smithville station could acquire programming on an exclusive basis with respect to the other.
- (B) The station in Jonesville would be entitled to network and syndicated exclusivity on cable systems within its own specified zone, but not on a cable system in Smithville or on any other cable system inside the Smithville 35-mile zone but outside the Jonesville 35-mile zone. The converse would be the case for the station in Smithville. If one of the two cities was much larger than the other, the station in the smaller market would therefore suffer a great competitive inequity, since it would be able to obtain network non-duplication and syndicated programming exclusivity in many fewer cable homes than would its direct competitor assigned to the other city.
- (C) If the example above were changed so that a third station were assumed to be assigned to Brownsville, located midway between Jonesville and Smithville and therefore 20 miles from each, the station assigned to Brownsville would be entitled to contract for program exclusivity as against both the Jonesville and Smithville stations and to enforce network and syndicated exclusivity on cable systems located in all three communities.

The example provided above is hypothetical, but similar situations frequently exist in the real world. One example is in the Fort Smith, Arkansas market in which a subsidiary of The New York Times Company operates a television station, KFSM-TV, which is assigned to Fort Smith. KFSM-TV is a VHF station with a wide service area. It also operates translator/LPTV facilities in the northern part of its market to assure that a high quality KFSM-TV signal will be available over the air and at cable headends in that portion of its market.

In the Fort Smith example, KFSM-TV's two network-affiliated competitors also each operate a station assigned to Fort Smith. Each competitor also operates a second station in the ADI, however -- KHOG-TV in Fayetteville in the case of Fort Smith station KHBS, and KFAA in Rogers in the case of Fort Smith station KPOM-TV, with the second station in each case being operated primarily (but not wholly) as a satellite. Both Fayetteville and Rogers are more than 35 miles from Fort Smith, and Rogers is more than 55 miles from Fort Smith.

Under the present rules, KFSM-TV cannot acquire programming on an exclusive basis against either the Rogers or Fayetteville stations. Since the Fayetteville station does originate some programming, this creates a particular inequity in the competition for some sports programming originated at the University of Arkansas in Fayetteville. KFSM-TV is prevented by Section 73.658(m) from acquiring such programming on an exclusive

basis against the Fayetteville station, and therefore cannot acquire the programming on an exclusive basis for the entire Fort Smith ADI. KFSM-TV is thus limited in the amount it is able to bid for the programming. KHBS and its Fayetteville satellite, on the other hand, are able to make a combined bid for exclusive programming rights in both Fort Smith and Fayetteville -- and may thus effectively obtain the same marketwide exclusivity that KFSM-TV may not obtain under Section 73.658(m).

Similar inequitable results are produced in the application of the network non-duplication and syndicated exclusivity rules for cable. KFSM-TV is entitled to network non-duplication in a single 55-mile zone around Fort Smith and to syndicated exclusivity in a single Fort Smith 35-mile zone. It is thus unable to claim syndicated exclusivity on cable systems in either Fayetteville or Rogers or on cable systems located in any other area outside its 35-mile zone, and is unable to claim network non-duplication protection on the cable system in Rogers or on systems in other communities outside the Fort Smith 55-mile zone. Both KHBS/KHOG-TV and KPOM-TV/KFAA, on the other hand, are entitled to network non-duplication protection within the 55-mile zone that surrounds Fort Smith and on cable systems within the 55-mile zones of the communities to which their respective satellites are licensed, zones that in each case include Fort Smith, Fayetteville, Rogers and the entire northern portion of the ADI. Similarly, both parent/satellite combinations are entitled to syndicated exclusivity in 35-mile zones surrounding

Fort Smith and the 35-mile zones of the communities to which their respective satellites are assigned -- areas that again in each case include Fort Smith, Fayetteville, Rogers and virtually all of the Fort Smith ADI.

No public policy is served by rules that distort the competitive process within a market in the manner described above.² The Commission should therefore revise the market listing in Section 76.51 to include in each market name all communities having assigned and operating commercial stations that are within the geographic boundaries of the ADI as defined by Arbitron. Upon such a change, all stations in an ADI will have the same rights to contract for territorial exclusivity with respect to each other, and all will have the same non-duplication and syndicated exclusivity rights under the Commission's cable rules.

As the Commission has noted in paragraph 20 of its Notice, there are a limited number of markets that are geographically so large that individual exceptions may be appropriate with respect to the ability of stations in such markets to obtain exclusivity as against other stations or on cable. Broadcast Respondents

² The other Broadcast Respondents are each similarly affected in one or more markets. For example: The "Denver" market, in which McGraw-Hill operates a station, does not include in its name communities such as Boulder or Longmont, which have operating stations; and the "Tampa-St. Petersburg" market, in which Great American operates a television station, does not include in its name communities such as Clearwater and Lakeland, both of which have operating television stations.

suggest that the Commission apply an alternative standard in such cases, based upon "evidence of viewing patterns in cable and non-cable households"³. Thus, the rule could provide that no station should be entitled to contract for territorial exclusivity against any other station located in a county in which the contracting station has not historically achieved specified viewing levels, either off the air or in cable homes. A station's right to claim network non-duplication protection and syndicated programming exclusivity could be similarly limited with respect to cable systems located in such counties.

We note finally the concern expressed by the Commission in paragraph 22 of the Notice that frequent revisions in the Section 76.51 list of markets and in the Arbitron geographic definitions of individual markets may be disruptive and may interfere with the ability of stations and cable operators to make long term plans. The Commission's suggestion that the list be changed every three years should accommodate such concerns, however. If the change to the market list and ADI definitions were in each case to be based upon Arbitron's designations and upon stations operating in communities as of the middle year of the three-year period, both cable systems and stations would have ample time to prepare for any changes in contracting rights and cable network non-duplication and syndicated exclusivity rights. In any event, however, the rule should provide that program exclusivity rights

³ See 1992 Cable Act, new Section 614(h)(1)(C)(ii)(IV).

legitimately acquired under Commission rules in effect as of the time a contract is negotiated should be enforceable for the duration of that contract, even if changes in a market's name or geographic definition would preclude the negotiation of similar exclusivity rights in a subsequent contract.

CONCLUSION

For the reasons set forth above, Section 76.51 of the Commission's Rules should be revised to include all markets, to define the geographic boundaries of each market as specified in Arbitron's ADI designations, and to include in the name of each market all communities within each ADI having assigned and operating television stations.

Respectfully submitted,

GREAT AMERICAN BROADCASTING
COMPANY

MCGRAW-HILL BROADCASTING
COMPANY, INC.

THE NEW YORK TIMES COMPANY



By /s/ Arthur B. Goodkind
Arthur B. Goodkind

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January 4, 1993